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NO.

Supreme Court, U.S.
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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1982

JAMES FRANCIS FRY,

Petitioner,

JIMMY RINCON MARTINEZ,

Petitioner,

VS.

THE STATE OF TEXAS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

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QUESTIONS PRESENTED

1. WHETHER ARTICLE 14.04 OF THE CODE OF CRIMINAL PROCEDURE OF TEXAS, AS INTERPRETED BY THE TEXAS COURT OF CRIMINAL APPEALS, VIOLATES THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

2. WHETHER THERE EXISTED SUFFICIENT EXIGENT CIRCUMSTANCES AT THE TIME OF PETITIONERS' WARRANTLESS ARREST IN THEIR HOME TO OVERCOME THE PER SE UNREASONABLENESS OF SAID ARREST?

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OPINION BELOW

The Opinion of the Texas Court of Criminal Appeals is reported in volume 639 of the Southwestern Reporter, second series, beginning on page 463 (639 S.W.2d 463). The decision was by vote of five to four.

JURISDICTION

The Texas Court of Criminal Appeals by panel opinion reversed Petitioners' convictions on June 9, 1982, whereupon Respondent filed a motion for rehearing. The Court below sitting en banc affirmed the convictions on October 6, 1982. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized."

STATUTORY PROVISIONS INVOLVED

Article 14.04, Code of Criminal Procedure of the State of Texas, V.A.C.C.P.:

> "Where it is shown by satisfactory proof to a peace officer, upon the representation of a credible person, that a felony has been committed, and that the offender is about to escape, so that there is no time to procure a warrant, such peace officer may, without a warrant, pursue and arrest the accused."

STATEMENT OF THE CASE

The Court is herein referred to pages in the transcription of trial testimony on file in the court below, i.e., the Statement of Facts (S/F). The Court is also referred to the facts as set out in the opinion of the Court below beginning at A-1 in the Appendix to this Petition.

Petitioners were among four persons accused of committing aggravated robbery upon the complainant Robert Herdman on March 25, 1978, in Dallas, Texas. Herdman testified that upon taking William Paddock home at 3:00

a.m. on March 25, 1978, he was ordered, at gunpoint, into a house that was three blocks from his apartment. Thereafter, Herdman, according to his testimony, was beaten and robbed of all his money by four individuals over a period of approximately ten hours. Herdman was taken back to his apartment at 2:00 p.m. on the same day and reported what happened to Dallas Police Officer Swafford (S/F 43-88).

Herdman's fiancee, Carol Hutrya, testified that two men attempted to burglarize Herdman's apartment earlier that morning around 5:00 a.m. She testified that one of the men was Paddock, whom Herdman had earlier left to take home, and the other was Petitioner Fry. Hutrya reported the incident to Officer Duesman and after they both drove around the neighborhood no car fitting the description of the one Herdman and Paddock left in earlier was found. She did not see Herdman again until around 2:00 p.m. when he returned to his apartment (S/F 89-163).

Officer Duesman was given a description of the car by Hutyra. The license number was stated to him and that it was an out-of-state plate, possibly California. The car was a blue and white Chevrolet. Duesman made a written report and left it for his replacement watch (S/F 164-186).

Investigator J. C. Arnold during the afternoon of March 25, 1978, received a call to proceed to 2833 Community Drive. He arrived there at approximately 3:00 p.m. (S/F 212), and talked to Officer Swafford and then to Herdman (S/F 213). Arnold talked to Herdman for about 30 to 40 minutes and afterward proceeded to a police substation where he phoned the Crimes Against Persons Section of the Dallas Police Department. Arnold requested additional manpower. He also told the sergeant on duty

that he "knew where the suspects probably were", and that he "didn't have time to secure a warrant" (S/F 215). Arnold also testified that on his way to the substation to call downtown he drove past 2415 Community Drive and saw the Chevrolet with California tags parked in front. After making the call he immediately went back to a position across the street from the suspects' house and "sat and watched the house" (S/F 219). Further, Arnold stated that "I went over to near Community and Harry Hines where I could observe the house in case the people left" (S/F 219). He stated that he watched the house approximately 25 to 30 minutes, and he "didn't see anything occur at the house" (S/F 220).

Upon arrival of a cover squad, Arnold and the other officers proceeded to the suspects' house at about 4:15 p.m. (S/F 222). Arnold knocked down the door and identified himself as a police officer. When one of the other officers saw movement inside the house, Arnold kicked open the door. All four suspects, including Petitioners, were then arrested. Only Petitioner Martinez was awake when the police officers entered the house. At trial the following items, seized in Petitioners' home, were admitted into evidence over objection: a sawed-off shotgun, a shotgun, a rifle, a baseball bat, a wooden club, three spent tubes of toothpaste, a knife, a shotgun shell, and hair specimens. In addition, thirteen photographs of various parts of the house, which were taken at the time of the arrest, were admitted into evidence.

No officers attempted to contact a magistrate in order to obtain an arrest warrant. Officer Arnold testified that because it was a Saturday he did not think such an attempt would be successful.

ARGUMENT ON QUESTIONS PRESENTED

1. WHETHER ARTICLE 14.04 OF THE CODE OF CRIMINAL PROCEDURE OF TEXAS, AS INTERPRETED BY THE TEXAS COURT OF CRIMINAL APPEALS, VIOLATES THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

The most recent interpretation of Article 14.04 by the court below was in Petitioners' case, *Fry and Martinez v. State*, 639 S.W.2d 463 (Tex. Crim. App. en banc, 1982). See also Appendix "A-1", *et seq.* Texas courts have not been consistent in their interpretation of this statute. Presently the court below holds that Article 14.04:

> ". . . does not require a showing that the offender was in fact about to escape, nor does it require that there in fact was no time to procure a warrant. The statute merely requires a showing that the officer was acting upon satisfactory proof from representation by a credible person that the felony offender 'is about to escape, so that there is no time to procure a warrant'."

Fry v. State, supra at A-34.

In order to properly develop the foregoing conclusion, a brief examination of the Texas court's treatment of this statute and its identical predecessor should be considered. Basically there have been two differing interpretations of Article 14.04 and the element that the accused must be "about to escape" before a warrantless arrest upon satisfactory proof may be made. Initially, the judicial interpretations held that the arresting officers must actually show that the offender was about to escape and that showing was indispensable. The showing by the officers must have

arisen from events they themselves witnessed or observed. *Cortez v. State*, 60 S.W. 536; *Rippy v. State*, 53 S.W.2d 619 (Tex. Crim. App., On Mot. for Reh., 1932); *Vinson v. State*, 137 S.W.2d 1048 (Tex. Crim. App., 1940). Imminent escape has long been held essential to a warrantless arrest under Article 14.04 and its predecessor. *Honeycutt v. State*, 499 S.W.2d 662, 664 (Tex. Crim. App., 1973).

> "In accordance with the strict construction given exceptions allowing warrantless arrests, this court has always required a clear showing the person arrested was about to escape."

Honeycutt v. State, supra at 665.

The first hint of a departure from *Honeycutt* was in a panel opinion of the court below in 1978 holding a warrantless arrest of suspects at a motel was permissible under Article 14.04 because the officers had been told by their informant that the suspects were about to leave the motel. Upon arriving at the motel and not seeing the suspects' vehicle, the officers feared that they had already fled. The court held that the officers had probable cause to believe that the suspects were about to flee and upheld the warrantless arrest. *Tarpley v. State*, 565 S.W.2d 525 (Tex. Crim. App., Panel No. 1, 1978).

In 1979, there was a further departure from prior precedent in *Maloy v. State*, 582 S.W.2d 125 (Tex. Crim. App., Panel No. 1, 1979)[1] In that case the arresting officers received information from their informant that the accused was about to "bug out" or flee the city soon. In upholding the warrantless arrest of the accused in his home, the court

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[1]The Court below relied solely on **Maloy** to arrive at its holding in the present case. See Appendix.

below simply reasoned that the officers acted in accordance with Article 14.04.

Another panel of the court below, in 1980, although in a case where the arrest was on a public street, reiterated that Article 14.04 requires a clear showing that the person arrested was about to escape. See *Hardison v. State,* 597 S.W.2d 355 (Tex. Crim. App., Panel No. 3, 1980). However, *Tarpley v. State,* supra, (information that suspects about to leave motel) was cited to show that all that was needed was information that the suspect was about to escape and some evidence about the time required to obtain a warrant. In *Hardison,* there was no information given to the arresting officer regarding escape nor was there any testimony that the officer felt there was no time to procure a warrant, and the Court declined to uphold the warrantless arrest. It would appear that the court below was moving toward the conclusion it reached in Petitioners' case that Article 14.04 required only that the officers be told that the offender was about to escape. In early 1982, the court below in yet another panel opinion, *Hogan v. State,* 631 S.W.2d 159 (Tex. Crim. App., Panel No. 3, 1982),[2] reversed a case involving a warrantless arrest in a tavern based on probable cause but not in compliance with Article 14.04. The key inquiry by the court:

> ". . . was it shown to the police officers that the appellant was about to escape? There was nothing in the record to show that the police officers were under the impression that the Appellant was about to escape and they would not have time to procure a warrant."

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[2]This opinion was authored, interestingly, by Judge McCormick, who dissented in the panel decision below. See Appendix.

The court below went on to state that under Article 14.04, a showing that the offender is about to escape is indispensable, citing *Honeycutt v. State,* supra. The court also found that there were no exigent circumstances. This case would tend to support the trend that Article 14.04 requires only that the officers be told that the offender is about to escape and not a "clear showing" that he is about to escape.

However, the court below one month later in May, 1982, rendered another decision, this time upholding a warrantless arrest under Article 14.04. See *King v. State,* 631 S.W.2d 486 (Tex. Crim. App., en banc, 1982). In *King,* supra at 497-498, the court again cites *Honeycutt v. State,* supra, as authority that there must be a clear showing the person arrested is about to escape. The court stated that the constitutional validity of a warrantless arrest or search can only be decided in terms of the "concrete factual situation presented" by each individual case, citing *Brown v. State,* 481 S.W.2d 106, 109 (Tex. Crim. App., 1972). The court went on to hold:

> "Thus, manifestly, from the 'concrete factual situation' spread on the record, it must be apparent that the offender was, in fact, 'about to escape'."

King v. State, supra at 497.

Petitioners would submit that the en banc decision in *King* reverses the "trend" by the court below up to this point to hold that the only requirement under Article 14.04 is that a credible person tell the arresting officers that the offender is about to escape. It would seem with *King* that it must appear *in fact* to the arresting officers that the offenders are about to escape. However, the next interpretation by the court below was in the present case, *Fry v. State,*

supra. In this case, the court below of course went back to the trend prior to *King* and held for the first time that no showing is required, in fact, that the offender is about to escape but only that a credible person tell the officers that the offender is about to escape.

It is also important to point out that the court below has not only been inconsistent in its interpretation of Article 14.04, but it has on occasion abandoned the statute altogether. The Texas court, in *Milton v. State*, 549 S.W.2d 190 at 192 (Tex. Crim. App., 1977), speaking through Presiding Judge Onion reflected upon the comparison of Article 14.04 to federal constitutional standards:

> "Unquestionably this state statute imposes greater restrictions on peace officers than does the federal constitution as interpreted by the United States Supreme Court."

In *Milton* the court held that it was not necessary to determine whether the requirements of Article 14.04 were met, but instead authorized the warrantless arrest of the accused in a cafe under *Terry v. Ohio*, 392 U.S. 1 (1968) and *United States v. Watson*, 433 U.S. 411 (1976). The court below likewise had declined to treat a warrantless arrest of the driver of an automobile as controlled by Article 14.04. See *Washington v. State*, 518 S.W.2d 240 (Tex. Crim. App., 1975) where the court merely mentioned Article 14.04 without applying it to the specific facts, but reasoned instead that the arrest was justified upon probable cause and exigent circumstances. See also *Jones v. State*, 565 S.W 2d 934 (Tex. Crim. App., Panel No. 2, 1978) where the court never even mentioned Article 14.04 to determine the legality of a warrantless arrest of a person in his home. Instead the court ruled that there was probable cause and

exigent circumstances citing only Texas authority and no federal authority.

It should be likewise pointed out that one month after Petitioners' convictions were affirmed, the Texas court decided yet another warrantless arrest case, presumably controlled by Article 14.04, *Jones v. State*, 640 S.W.2d 918 (Tex. Crim. App., Panel No. 1, 1982). In this *Jones* case the accused was arrested without a warrant but upon probable cause as he stepped off an airplane at Houston Intercontinental Airport. After detailing the facts to support a finding of probable cause, the court merely concluded that "there were exigent circumstances" justifying the officer's failure to obtain a warrant without stating what the circumstances were. The only mention of Article 14.04 in the opinion was: "Further, the arrest was proper under Article 14.04, V.A.C.C.P." See also Judge Clinton's dissent at page 921 which complains that the majority failed to apply Article 14.04.

By all of the foregoing, Petitioners would show this Court that the Texas Court of Criminal Appeals has not consistently applied Article 14.04 to fact situations involving warrantless arrests. Since the court below has apparently acknowledged that Article 14.04 imposes greater restrictions on arresting officers than does federal constitutional standards, whether the lower court is consistent in applying Article 14.04 is not one which would necessarily invoke the authority of this Court with one exception: If the Texas court, in its inconsistency and arbitrariness, fails to construe fact situations or interprets otherwise more restrictive state rules in a manner that does not meet federal constitutional standards, then the citizen should be heard in this last Court.

In this connection, it is most important to point out that Texas has *never* distinguished between warrantless arrests in one's home as opposed to elsewhere in its many opportunities to interpret Article 14.04. This Court has certainly made that distinction in *Payton v. New York*, 445 U.S. 573 (1980) and *United States v. Watson*, supra. Texas, from the earliest times, never needed to recognize specially the sanctity of a person's house because Article 14.04 and its predecessor was, and is on its face, more restrictive to police activity than current federal constitutional standards, e.g., "exigent circumstances" as enunciated in *Dorman v. United States*, 435 F.2d 385 (D.C. Cir., en banc, 1970).

The original panel opinion below attempted, for the first time in Texas, to construe the importance and significance of *Payton v. New York*, supra. But in doing so, the panel observed that a peace officer's authority to make a warrantless arrest is controlled exclusively by statute (Article 14.04), *Fry v. State*, supra at A-9, and therefore there was no need to consider the federal standards because the facts of Petitioners' case failed under the state standards. The panel opinion found that the sole question was whether the State met its burden of proving that the arresting officers reasonably believed that the Petitioners were about to escape, so that there was no time to procure a warrant, supra at A-9.

The court below, sitting en banc, decided to construe Article 14.04 as meaning something entirely different. Petitioners would contend that the new construction placed on that statute violates the Fourth Amendment for the following reasons:

A. It does not distinguish warrantless arrests in a person's home. It fails to recognize, as this Court has so

recognized, the sanctity of the home.

B. The requirement that there merely be "a showing that the officer was acting upon satisfactory proof from representations by a credible person that the felony offender is about to escape, so that there is no time to procure a warrant" makes the exigency of the fact situation turn only on the observations of the "credible person" and not the arresting officers. This clearly does not comport with *Payton v. New York*, supra, and *Dorman v. United States*, supra. It was never intended that exigency of the situation, so as to excuse the necessity of a warrant, would be decided prior to the involvement of the police and only "represented" to them later.

C. The Texas statute, Article 14.04, is similar in many respects to the New York statute that was condemned in *Payton v. New York*, supra, in that both laws spell out the procedure required in making warrantless arrests. In New York law, New York Crim. Proc. Law §140.15(4) (McKinney, 1971), went somewhat further than Texas and instructed upon the warrantless entry of premises where an offender might reasonably be found. In addition to the escape "exigency" in Texas, New York provided "exigencies" regarding the protection of life or safety of the officer or another person as well as the potential destruction, damaging or secretion of evidence. It should be noted that this Court took special pain to quote from the dissent in the *Payton* case before the New York Court of Appeals, 408 N.Y. 2d 300; 380 N.E.2d 224 (1978):

> "The dissenters noted . . . 'the statutory authority of a police officer to make a warrantless arrest in this State has been in effect for almost 100 years' but concluded that 'neither antiquity

> nor legislative unanimity can be determinative of the grave constitutional question presented' and 'can never be a substitute for *reasoned analysis*'." [Emphasis supplied]

Payton v. New York, supra at 1377-8. The Texas Courts have not, except by panel opinion which could be characterized as a dissent[3], given analysis, much less a reasoned one, to the "grave constitutional question" here presented. The New York Court of Appeals attempted to distinguish the sanctity of the home (it simply decided the question incorrectly). Texas Courts have not made the attempt, and their construction of Article 14.04 has resulted in the implementation of no greater restrictions on police intrusions into the home than was provided in the New York statute.

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2. WHETHER THERE EXISTED SUFFICIENT EXIGENT CIRCUMSTANCES AT THE TIME OF PETITIONERS' WARRANTLESS ARREST IN THEIR HOME TO OVERCOME THE PER SE UNREASONABLENESS OF SAID ARREST?

The arrest of Petitioners, being without warrant and in their own home, was per se unreasonable unless the police can show it falls within one of the exceptions based on the presence of exigent circumstances. *Coolidge v. New Hampshire,* 403 U.S. 443 (1971); *Payton v. New York,* supra; *Dorman v. United States,* supra.

The facts in this case are not disputed. The complainant Herdman, upon reporting the offense to the police at 2:00 p.m. to a patrol officer, stated that he had been beaten and

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[3]**Fry v. State,** supra at A-5-6.

robbed at a nearby house by four men. At 3:00 p.m. a detective, Officer Arnold, arrived at Herdman's apartment and Herdman told Arnold that the men had discussed leaving for California that day. He also told them that at the time he was released, about 2:00 p.m., three of the four men were asleep or passed out. Arnold left Herdman's apartment about 3:30 p.m. and drove to a nearby police substation. He called the Crimes Against Persons Section of the police department and requested additional manpower to assist him in arresting the four men described by Herdman. He told the sergeant on duty that "he knew where the suspects were" and that he "didn't have time to secure a warrant". After making the call, Arnold drove to a position near the house. He kept it under surveillance until the back-up officers arrived about 30 minutes later. During that time Arnold saw nothing occur at the house. *Fry v. State*, supra at A-4. Arnold had been told by Herdman's girl friend that the four men had a blue and white Chevrolet with out-of-state plates, possibly California. On his way to the police substation Arnold drove past the house and saw that automobile parked in the front yard. It had California plates.

At about 4:15 p.m., Arnold and the other officers surrounded the house. Arnold knocked on the front door and identified himself as a police officer. When one of the other officers saw movement inside the house, Arnold kicked open the door. Only one of the four men was awake when the police entered the house. *Fry v. State*, supra at A-4.

Petitioners would attempt to make the "reasoned analysis" that has not heretofore been afforded them by the Texas courts.

A.

> "Terms like 'exigent circumstances' or 'urgent need' are useful in underscoring the heavy burden on the police to show that there was a need that could not brook the delay incident to obtaining a warrant, and that it is only in the light of those circumstances and that need that the warrantless [arrest] meets the ultimate test of avoiding condemnation under the Fourth Amendment as 'unreasonable'."

Dorman v. United States, supra at 392.

In considering the "exigent circumstances" put forth in *Dorman v. United States*, Petitioners readily admit that most of the circumstances are successfully met by the State. There is no question that a grave offense was involved; that the suspects were likely to be armed; that there was strong reason to believe that the suspects were in the premises; and that the entry was made in the daytime rather than at night.

On the issue of whether there was a clear showing of probable cause including "reasonably trustworthy information", the record below will reflect that sufficient probable cause existed upon which a magistrate could have issued an arrest warrant.

Regarding the likelihood that the suspects would escape if not swiftly apprehended, the record reflects that there was no likelihood of an escape. Thus, it cannot be said that there was an "urgent need" to forego the obtaining of a warrant. It is important to note that Herdman, as the record below reflects, had just gotten out of the shower

when his girl friend arrived at his apartment with Officer Swafford. He had made no outcry of the crime prior to Swafford's arrival at about 2:00 p.m. In fact, the first thing Herdman did was take a shower. He then reported the offense to Swafford and the location of the suspects. Approximately one hour transpired before Arnold arrived (why did Swafford not call for cover squads and pursue the suspects?). Herdman then restated the events to Arnold and said that the suspects discussed leaving that day for California. At about 3:30 p.m. Arnold left Herdman's apartment and drove to a police substation and on the way intentionally drove by the suspects' house and observed the automobile with California plates (why did Arnold not call for cover then and immediately arrest the suspects?). After making a call to a superior officer to advise him that "he knew where the suspects probably were and that he didn't have time to secure a warrant", *Fry v. State*, supra at A-4, he returned to the suspects' house and kept it under surveillance for about 30 minutes until his cover officers arrived (all the time noticing that the suspects' automobile remained in their front yard and that there was no attempt to escape).

Therefore, it can be found, as it was in the panel opinion below, *Fry v. State*, supra at A-7, that the belief of the officers that the suspects were about to escape was ambiguous at best. The panel opinion resolved that ambiguity in favor of Petitioners. Thus, there is no showing of "urgent need" to forego the warrant requirement because the officer's surveillance would not have allowed an escape. There is a further reason to negate that "urgent need" as will be shown following.

B.

> "To complete the analysis we must consider the other side of the question: What delay would have been involved in obtaining a warrant?"

Dorman v. United States, supra at 394.

The panel opinion below, *Fry v. State*, supra at A-7 — A-13, reflects that the officers never attempted to contact a magistrate, and that Arnold's assumption that there was no time to secure a warrant does not meet the test of reasonableness.

No delay would have been involved in obtaining a warrant in this case because the suspects were already, in effect, prisoners, being under constant surveillance and unable to escape.

CONCLUSION

Petitioners contend that the interpretation placed on Article 14.04 by the Texas Court of Criminal Appeals in the case below fails to provide the necessary safeguards and restrictions upon police conduct in carrying out warrantless arrests in the home, the same being presumptively unreasonable.

Petitioners further would contend that when the "reasoned analysis" that should be made upon such a "grave constitutional question" as this is made in the present fact situation, the presumption of unreasonableness cannot be overcome. The facts of the case below fail to show that an "urgent need" was presented to the officers who broke into the home of Petitioners.

It is respectfully urged that the writ of certiorari be granted and this Court reverse the decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, TOM S. McCORKLE, Counsel for Petitioners JAMES FRANCIS FRY and JIMMY RINCON MARTINEZ, hereby certify that copies of the above and foregoing Petition For A Writ of Certiorari to the Court of Criminal Appeals of Texas have been mailed to the following person:

HONORABLE JIM MATTOX
Attorney General of Texas
Supreme Court Building
Austin, Texas 78711

by placing same in the United States mail, certified, postage prepaid, on this 4th day of January, 1983.

/s/ Tom Scott McCorkle, Jr.